In the District Court of the United States for the Northern District of California, Southern Division

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NORTH COAST TRANSPORTATION COMPANY, A CORPORATION, AND INDEPENDENT STAGES, INC., A CORPORATION, PLAINTIFFS-APPELLANTS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

Civil No. 22528–S

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint seeking to set aside an order of the Intersate Commerce Commission. The decree was entered on May 9, 1944. Previously the court on

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February 29, 1944, had entered an order vacating a temporary injunction dismissing the complaint. This order further stated that counsel for defendants might submit findings of fact and conclusions of law in conformity with Rule 52 (a) of the Federal Rules of Civil Procedure. On March 2, 1944, the court filed a written opinion which concluded that the Commission's order was lawful, that the temporary injunction would be vacated, and that the suit would be dismissed. This opinion also stated that counsel for defendants might prepare findings of fact and conclusions of law. Plaintiffs, apparently thinking the above order of February 29, 1944, was a final order, took an appeal therefrom before findings of fact and conclusions of law had been approved by the court. This appeal was allowed on April 18, 1944. On May 20, 1944, these appellees in response to this appeal filed with the District Court a motion to affirm the court's order under Rule 12, paragraph 3 of the Supreme Court Rules. In the interim the District Court on May 9, 1944, had entered an order allowing in part and overruling in part exceptions filed by plaintiffs to findings of fact and conclusions of law submitted by defendants. On the same day the court entered a so-called "final decree" reciting that the court had handed down an opinion and had entered findings of fact and conclusions of law, and ordering that the temporary injunction be denied and the complaint be

dismissed. The present appeal from the "final decree" was allowed on June 10, 1944, and the appeal papers were served on appellees on June 14, 1944.

It is clear from the foregoing that this appeal attempts to review the same action of the District Court as did the earlier appeal, and that this second appeal was necessitated only because the first appeal was prematurely taken. Except for an assignment of error alleging that the court was without power[1] to enter its findings of fact, conclusions of law, and final decree of May 9, 1944, because it had issued a final order on February 29, 1944, the errors assigned on this appeal are otherwise the same as those assigned on the first appeal. For the reasons set forth in our motion to affirm heretofore filed in connection with the first appeal, appellees respectfully submit that the present appeal likewise presents no substantial question and that the final decree of the District Court should therefore be affirmed without argument. In any event, however, the former appeal,

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[1] That there is no basis for this contention is plain from the fact that the court's earlier order, from which the first appeal was taken, specifically stated that defendants might file findings of fact and conclusions of law. While the "final decree" of May 9 may not have been necessary, since it did no more than the earlier order, by the same token it did not harm plaintiffs any more than the earlier order.

having been superseded by this one, should be dismissed.

CHARLES FAHY,
Solicitor General,
DANIEL W. KNOWLTON
Chief Counsel,
Interstate Commerce Commission.

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